Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange	)	
Carriers	)	

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES ON NOTICE OF PROPOSED RULEMAKING

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SUMMARY

The RBOCs and their trade association -- USTA -- purport to be following the dictates of the Supreme Court and the D.C. Circuit Court in the views expressed in their virulently anti-unbundling comments. The issue here is meaning of the word "impair" found in 47 U.S.C. § 251(d)(2)(B). The RBOCs would have it that there is no impairment unless there is impossibility. The RBOCs' position has nothing to do with the "ordinary and fair" meaning of impairment, the Supreme Court's standard for interpreting the Act.

In many respects the RBOCs ignore the portions of the D.C. Circuit's decision in *USTA II* that might possibly allow unbundling -- such as the requirement that any unbundling analysis be granular, addressing conditions in specific markets rather than nationwide averages and abstractions. The RBOCs' generalizations are especially obvious in their discussion of unbundled local switching to serve the mass market, the unbundled network element that NASUCA's comments focused on. Apparently, in the RBOCs' view, Congress was not really

serious when it included Section 251(c)(3) in the 1996 Telecommunications Act. According to the RBOCs, Congress intended unbundling to occur only where facilities-based competition is impossible. Of course, that does not explain why Congress said only that unbundling was required where competitors were "impaired" without access to UNEs.

Another aspect of *USTA II* that the RBOCs ignore is the D.C. Circuit's acceptance of the FCC's analysis of intermodal competition. The RBOCs attribute a competitive importance to these services, which are not really substitutes for local exchange service, an importance that goes far beyond the holdings of *USTA II*.

The RBOCs' comments do little to disturb the positions that NASUCA took in the initial comments. NASUCA proposed to the Commission a framework for rules that will promote competition for residential and small business customers, consistent with the Act. NASUCA's proposal was based on a detailed review of the statute, the Supreme Court's decisions, and the decisions of the D.C. Circuit Court of Appeals. This sort of review was absent from the RBOCs' comments, which are focused only on minimizing the level of unbundling. Again, this is not consistent with the ordinary and fair meaning of "impairment" as used in the statute.

NASUCA attempted to salvage as much as possible of the Commission's *Triennial Review Order*. The RBOCs would have the Commission radically depart from the *Triennial Review Order* in many respects, in order to virtually eliminate their unbundling obligation. Yet they defend on all sides and depend on the portions of the *Triennial Review Order* where unbundling was eliminated.

The need and ability to preserve much of the impairment analysis of the *Triennial Review Order* is found in the comments of the state commissions. These state commission comments show their efforts to comply with the mammoth tasks that the *Triennial Review Order* imposed

on them in a short timeframe, but also demonstrate that most of the states were unable to complete these tasks before *USTA II* interrupted the process. The comments tend to support NASUCA's proposal that the FCC's national finding of impairment for mass market local switching be changed to a presumption of impairment. Clearly, however, the FCC has much more to do in order to make the nuanced findings that *USTA I* and *USTA II* required.

I. IMPLICATIONS OF THE LIMITED TIME AND ABILITY TO RESPOND

In part because of its own delayed action, the Federal Communications Commission ("Commission") has created a situation where comment on these crucial issues is made even more difficult than usual for parties and organizations with limited resources. This is particularly true for these reply comments. It should have been obvious that allowing only fourteen days for parties to respond to what was likely to be a mass of filings -- particularly from the Regional Bell Operating Companies ("RBOCs") -- would not allow many parties an adequate opportunity to respond. The sheer bulk of the comments filed has fully justified such a conclusion.

The problems here are exacerbated by the considerable administrative difficulties seen even in obtaining copies of the filings. On October 14, 2004, NASUCA[1] and the Office of the

[1] NASUCA is a voluntary, national association of 44 consumer advocates in 42 states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. Ann. Subdiv. 6; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

Ohio Consumers' Counsel ("OCC")[2], filed a motion to extend the time in which to file reply comments.

The reasons for the request were stated as follows: On August 20, 2004, the Commission released its Order and Notice of Proposed Rulemaking ("*NPRM*") in this proceeding.[3] The Commission solicited comments on a panoply of issues involving unbundling rules to implement certain obligations under the Communications Act of 1934, as amended.[4] The Commission's *NPRM* was intended to address the District of Columbia Circuit's decision in *United States Telecom Ass'n v. FCC*.[5] Under the *NPRM*, the Commission advised that initial comments were to be filed 21 days after the publication of the *NPRM* in the Federal Register.[6] Reply comments were due within 15 days after filing of the initial comments.[7] The *NPRM* was published in the Federal Register on September 13, 2004. Hence, initial comments were filed on October 4, 2004, with replies to be filed on October 19, 2004.

A crucial issue here is the fact that much purportedly confidential material was filed in comments. In a September 29, 2004, Order, the Commission expedited the process for making confidential data available by reducing the response time from five business days to three

[2] The OCC is the state agency designated by Ohio law to represent the interests of residential utility consumers before state and federal regulators and in the courts. See Ohio Rev. Code Chapter 4911.

[3] *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, Order and Notice of Proposed Rulemaking (Aug. 20, 2004) ("*NPRM*").

[4] Id., ¶¶ 8-15.

[5] Id., ¶ 1, citing *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

[6] *NPRM*, ¶ 32.

[7] Id.

business days.[8]

After the initial comments were filed, NASUCA and the OCC began working on reply comments, utilizing the Commission's electronic comment filing system ("ECFS") as the source not only for determining what parties had filed initial comments, but also as a source for obtaining copies of parties' initial comments. Notably, at several places within its *NPRM*, the Commission directed parties to the ECFS as a source for downloading filings and comments, and noted the ECFS as a database to aid interested parties in their participation in the proceeding.[9] Heeding the Commission's directive, NASUCA and the OCC relied on the ECFS to provide them with notice of the initial comments filed in this case.

On October 13, 2004, counsel for NASUCA and OCC was advised by the FCC's Office of the Secretary and by FCC's commercial copier, Best Copy and Printing Inc. ("BCPI"), that such reliance was inadvisable. Counsel learned that Verizon had filed initial individual comments on October 4, 2004 that were not yet, after nine days had passed, in the ECFS.[10] In fact, on October 13, 2004, the Office of the FCC's Secretary advised that there were a number of comments, in addition to Verizon's, that had been filed on October 4, 2004, that were not yet in the ECFS. Upon contacting BCPI, counsel determined that approximately twenty initial

[8] Id. Indeed, foreseeing the tightness in the schedule for replies, counsel at the OCC, acting on behalf of NASUCA, took affirmative action to shorten the time lag for reviewing confidential filings. By correspondence dated September 27, 2004, counsel filed at the FCC and served upon a number of parties, Acknowledgments of Confidentiality and Requests for Copies of confidential information. The filing was meant to begin the five-day period so that on October 4, 2004, confidential information from the parties would be received from the parties served. Unfortunately, those parties did not treat the filing as beginning the five-day period and counsel has experienced some delay in receiving the confidential information requested.

[9] *NPRM*, ¶¶ 41, 43.

[10] Counsel learned on October 13, 2004, from communication with Counsel for Verizon that Verizon had in fact filed individual comments on October 4. Counsel for Verizon advised that the FCC had not as of October 13, 2004, updated the EFCS for this docket to reflect the filing of Verizon's initial comments.

comments -- some from major stakeholders such as Verizon -- had been filed on October 4, 2004, but had not yet been placed in the ECFS.[11]

As this Commission itself noted, this proceeding is enormous in terms of the complexity, scale, and scope of issues that are to be addressed. Thus, it is not surprising that a number of the parties have filed quite lengthy comments. For example, Verizon's comments alone, which NASUCA and the OCC received on October 13, 2004, are 158 pages in length. SBC's comments, received by NASUCA and the OCC on October 14, 2004, are 130 pages long, plus voluminous attachments.

Under these circumstances, NASUCA and the OCC requested a two-week extension, in order for parties to adequately prepare replies to the initial comments. The motion for an extension was denied by order dated October 18, 2004.

Given that the Commission has not granted an extension, the Commission must consider many parties' limited abilities to respond fully, especially to the RBOCs' material. The Commission cannot accept the RBOCs' arguments as if they are not capable of refutation, merely because the schedule has not allowed an adequate response. A rush to judgment without proper foundation will adversely impact all stakeholders, including the consumers whom NASUCA members represent. The needs of the consumers, more often assumed than addressed in the federal regulatory regime, are deserving of the Commission's special consideration here.

[11] In addition, counsel contacted SBC Communications, Inc. ("SBC") on October 14, 2004 to determine whether SBC had filed comments. SBC's counsel confirmed that SBC had filed comments on October 4; neither ECFS nor BCPI had listed SBC as a party filing comments.

II. RESPONSE TO RBOCS

A. The "UNE Fact Report"

The four RBOCs -- BellSouth, SBC, Qwest and Verizon -- submitted a "UNE Fact Report," which apparently is supposed to describe the status of competition in their various regions; nothing filed with the Report actually describes its purpose. One can presume, however, that the Report is intended to supplement the prior reports that the Commission paid only sporadic attention to in the Triennial Review proceeding. The current report is no more deserving of deference than were the prior versions.

NASUCA is not in a position to examine the veracity of the specific data presented in the Report; that function is more appropriately left to the CLECs that purchase unbundled network elements ("UNEs") from the RBOCs. Instead, NASUCA will address the Report's numerous over-generalized assertions, which do not stand up to close scrutiny.

The Report places great emphasis on the existence of Voice over Internet Protocol ("VoIP") service, circuit switched cable telephony, and wireless service as competitive substitutes for voice service over the public switched telephone network. For example, the RBOCs claim that VoIP "now matches conventional voice service in functionality, voice quality, and backup power."[12] This assertion focuses on technical aspects of VoIP, which may or may not apply to all VoIP providers.[13] In addition, the RBOCs gloss over a key area in which much VoIP service is still sorely lacking: access to Enhanced 911 ("E911"). The Report dismisses this important function, which can literally be a life or death issue to consumers, in just two

[12] Report at I-2.

[13] See id. at II-20 through II-27.

sentences:

> The one primary-line feature that not all VoIP providers have implemented is Enhanced 911 capability. A number of VoIP providers have accordingly adopted alternative 911 capabilities that analysts believe many consumers will find adequate.[14]

The only such analyst review cited in the Report was one from Merrill Lynch from November 2003, which speculated that "Vonage's simple 911 solution, where the user specifies his location such that a call from his 'number' reaches the right PSAP (Public Service Answering Point) might well be adequate."[15] NASUCA and others, however, have shown the Commission the flaws in Vonage's attempt to solve the E911 problem with its VoIP system.[16] Although some VoIP providers have gone to great lengths to make their systems E911 compatible,[17] they are unfortunately in the minority. VoIP is still a long way from being the equivalent of landline service in E911 capability.

In addition, much of the other support for the RBOCs' position on VoIP can be dismissed as puffery. In Table 6, for example, the RBOCs attempt to show what they purport to be "Universal Agreement That VoIP Quality Is Comparable to or Better Than PSTN."[18] In this Report, the RBOCs present quotes from VoIP providers, investment analysts and equipment suppliers. The quotes from the providers and the suppliers can be almost summarily dismissed, since they have a vested interest in promoting VoIP. The investment analysts' views seem to be related strictly to voice quality, and not to other aspects of functionality.

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[14] Report at II-24 (footnotes omitted).

[15] Id., n. 116.

[16] *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, NASUCA Comments (May 28, 2004) at 49, 52.

[17] See http://www.usatoday.com/tech/news/2004-10-12-voip-trouble_x.htm (Time Warner).

[18] Report at II-21.

When put into proper perspective, the RBOCs' views concerning consumers' reliance on wireless are just as shallow. First, the RBOCs' Report purports to describe the situation in their entire service territories, or, in fact, nationwide. This information is not at all "nuanced" as required by the D.C. Circuit in *USTA I*.[19] There, the Court required that the impairment analysis take into consideration "market-specific variations."[20] This Commission has determined that a geographic market cannot encompass an RBOC's entire statewide service territory[21] and, as noted below, the vast majority of state commissions that have addressed the issue have determined that the appropriate geographic market should be wire centers or clusters of wire centers.

Second, the RBOCs claim that "[a]t least 14 percent of U.S. consumers now use their wireless phone as their primary phone, and at least 7-8 percent have given up wireline service entirely."[22] Even if true, that means that approximately **86%** of consumers still rely primarily on **wireline** service and approximately 93% of consumers still have wireline service. Thus, the RBOCs and other ILECs still have bottleneck control over the facilities that CLECs must use to reach the vast majority of the nation's telephone consumers.

The Commission should not be swayed by the RBOCs' over-generalizations and inaccuracies. Instead, the Commission should examine whether competition would be harmed by elimination of the unbundled network element platform ("UNE-P") in the geographic markets where the RBOCs have challenged the impairment finding.

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[19] *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 426 (D.C. Cir. 2002) ("*USTA I*").

[20] Id. at 422.

[21] *Triennial Review Order*, ¶ 495.

[22] Report at I-5.

B. Individual RBOC comments

Neither should the Commission be persuaded by the comments filed by the individual RBOCs. NASUCA touches here on a few key flaws in the RBOCs' arguments. As in the initial comments, NASUCA's concerns here focus exclusively on the RBOCs' comments on unbundled local switching ("ULS") used to serve the mass market.

1. SBC

To begin, SBC recites national statistics that it claims show that there is no impairment for local switching.[23] Recognizing that these numbers say little about the mass market, SBC then makes the claim that "three million [mass market customers] are being served by CLEC switches combined with unbundled local loops," citing the UNE Fact Report discussed above.[24] SBC overlooks the significance of the fact that this number has not changed since similar data was submitted in the Triennial Review proceeding.[25]

SBC's analysis looks at switch-based competition on a Metropolitan Statistical Area ("MSA")-wide basis.[26] NASUCA's comments showed that the MSA is far too large to use as a granular geographic market.[27] SBC's analysis would find impairment throughout an MSA if there was a single CLEC serving mass market customers with its own switch anywhere in the MSA. SBC's view would mean there was no impairment if there was any possibility of CLEC

[23] SBC Comments at 39-41.

[24] Id. at 42.

[25] See Verizon Comments at 104.

[26] SBC Comments at 42.

[27] See NASUCA Comments at 20-22.

switch-based competition. That is scarcely an "ordinary and fair" interpretation of impairment.[28]

SBC also argues that the Commission's "multi-competitor standard was unlawful…."[29] This is based on SBC's proposition that

> [a] test based on the existence of multiple facilities-based providers does not ask whether the relevant facility is "suitable" for competitive supply, but rather asks whether the market is *already* fully competitive. … Section 251(d)(2)(B) focuses on the "ability" of competitors to provide service, not whether they are already providing service ubiquitously. And the fact that an efficient … competitor is providing service with its own facilities in a number of markets necessarily shows that an efficient carrier is "able" to provide such service in other markets with those same characteristics.[30]

It is difficult to know where to begin to counter this "legal" argument, unaccompanied as it is by anything but a citation to the statute. Again, SBC would say that a competitor was "impaired" only if it was totally prevented from operating. The existence of a single competitor serving a few small business customers in a wire center within an MSA does not show that CLEC-owned switching is suitable for competitive supply throughout the MSA. SBC has not in any way identified the characteristics that define markets where the existence of a facilities-based competitor in a market "with those same characteristics" would preclude unbundling.

2. Verizon

Verizon goes right to the heart of the matter. Verizon says that "the fundamental question posed by the impairment standard is whether competition is *possible* -- not whether actual competition is already occurring or whether markets are fully competitive."[31] Again, this

[28] See *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 389-390 & n.11 (1999) ("*Iowa Utilities*").

[29] SBC Comments at 42.

[30] Id. at 29-30 (emphasis in original).

[31] Verizon Comments at 12 (emphasis in original).

ignores the Supreme Court's directive in *Iowa Utilities* that it is the "ordinary and fair" meaning of "impair" that must be considered.[32] Verizon's position also reads far more into *USTA II*'s consideration of the mere possibility of CLEC facilities than can be gleaned from the D.C. Circuit's opinion.[33]

Verizon also faults the Commission for "discounting" intermodal competition.[34] In *USTA II*, the D.C. Circuit noted the ILECs' "claim that the Commission's impairment standard … excludes consideration of intermodal alternatives"[35] but refused to decide "[w]hether the weight the FCC assigns to this factor is reasonable in a given context…."[36] This issue remains open.

Verizon notes the D.C. Circuit's recognition that in the "mass market switching context, … the evidence indicated the presence of many markets where CLECs suffered no impairment in the absence of unbundling…."[37] The D.C. Circuit was referring there to the "evidence" adduced in the Triennial Review proceeding. The evidence uncovered in the state unbundling proceedings -- such as that discussed in the next section -- shows the existence of many more markets where CLECs are impaired in serving the mass market -- especially the residential market -- in the absence of unbundled local switching.

Verizon contradicts itself in discussing the proper geographic market. For high-capacity facilities, Verizon suggests use of the MSA because "MSAs are smaller in size than other

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[32] *Iowa Utilities*, 525 U.S. at 389-390 & n. 11.

[33] See Verizon Comments at 12, citing *USTA II*, 359 F.3d at 571, 575.

[34] Verizon Comments at 18.

[35] *USTA II*, 359 F.3d at 572.

[36] Id.

[37] Verizon Comments at 89, citing *USTA II*, 359 F.3d at 587.

potential markets, such as LATAs or entire states, minimizing the chance of false negatives and confining them to small pockets within the MSA."[38] On the other hand, for mass market switching Verizon states that the Commission should view impairment on a *nationwide* basis.[39] Verizon asserts that although CLECs operate "throughout the major MSAs in Verizon's operating territory" they "are rolling out their competitive offerings across the country."[40] Apparently, Verizon is not concerned about "minimizing the chance of false negatives and confining them to small pockets" when it comes to mass market switching.

Because of density, cost and other factors, some consumers still have no true competitive choice for local exchange service. Using a nationwide geographic market for the mass market switching impairment analysis could result in a nonimpairment finding for those consumers' areas simply because CLECs are not impaired in serving other areas thousands of miles away. Verizon's proposal would be patently unfair to those consumers. The Commission should reject Verizon's recommendation.

3. BellSouth

BellSouth follows the (mis)lead of its fellow RBOCs by citing the "extensive" deployment of competitive switches and the wide availability of other competitive alternatives as proof that there is no impairment for unbundled local switching.[41] Again, this blanket national statement goes against the D.C. Circuit's requirement of a "nuanced" approach.

Indeed, BellSouth also says that the impairment analysis must focus on whether

[38] Verizon Comments at 27.

[39] Id.

[40] Id.

[41] BellSouth Comments at 15-26.

"competition is possible."[42] BellSouth claims that, even in markets where competitors have yet to deploy, " the Commission cannot merely conclude that the absence of competitors is 'proof' of impairment." Instead, "the Commission must consider whether competition is possible by considering competitive deployment in "similarly situated" markets."[43] BellSouth does not describe how the Commission is to determine which markets are "similarly situated." It is important to note, however, that the Commission's potential deployment test (where state commissions were to find impairment only where competitive service is uneconomic absent unbundling) adequately addresses BellSouth's point.

On the other side, BellSouth also argues that evidence of any level of deployment is "dispositive" of a lack of impairment.[44] In the *Triennial Review Order*, the Commission properly dismissed BellSouth's "dispositive evidence" argument, finding that at most such evidence "may indicate" a lack of impairment.[45]

BellSouth goes so far as to claim that there should be no distinction between switching used to serve enterprise customers as compared to switching used to serve mass market.[46] BellSouth argues the fact that CLECs can and do serve both markets "proves" that "any alleged barriers to entry have been overcome."[47] Moreover, according to BellSouth, the rapid advances

[42] Id. at 11.

[43] Id. at 10.

[44] Id.

[45] *Triennial Review Order*, ¶ 94.

[46] BellSouth Comments at 16.

[47] Id.

in intermodal alternatives "mandate both an extension of the no unbundling decision to all circuit switching as well as an eradication of the fictitious enterprise/mass market distinction." [48]

BellSouth's overly simplistic approach to switching is just not workable given the vast differences in the level of competition found for mass market versus enterprise switching. To do as suggested by BellSouth would completely undermine the granular approach to the unbundling analysis which is required by *USTA I*. As the Commission determined in the *Triennial Review Order*, mass market and enterprise markets differ significantly based on the services purchased, the costs of providing service, and the revenues generated.[49] It is these differences that require an individual determination, on an element by element basis, depending upon the customer class the competing carrier seeks to serve.[50] Additionally, as found by the Commission, distinguishing customers by class is a means of ensuring that the unbundling rules will bring the benefits of competition to all customers, not just to enterprise customers.[51]

4. Qwest

Qwest strikes out on its own by arguing there can be no finding of impairment for mass market switching based on the fact that there is no natural monopoly for the provision of mass market voice services.[52] Qwest believes that the impairment determination must focus on whether the natural monopoly characteristics of a particular network element make that network

[48] Id. at 17.

[49] *Triennial Review Order*, ¶ 124. As argued in NASUCA's initial comments (at 15-18), the same principles should apply to make residential service and small business service separate markets.

[50] Triennial Review Order, ¶ 124.

[51] Id., ¶ 125.

[52] Qwest Comments at 42.

element effectively unavailable in absence of unbundling.[53] Under Qwest's approach, if the network element does not have natural monopoly characteristics, there is no need to unbundle regardless of whether CLECs are impaired without access to the UNE. Qwest concludes that the existence of competition (from circuit-switched CLECs and from intermodal sources such as VoIP) demonstrate that mass market switching is not a bottleneck monopoly facility.[54] Again, there is little relation between Qwest's view of impairment and the ordinary and fair meaning of the word.[55]

Qwest's arguments here are no more than a restatement of the essential facilities doctrine, which was appropriately rejected by the Commission in the *Triennial Review Order*.[56] There the Commission found the essential facilities doctrine should be only used as a guide in formulating the impairment standard.[57] Qwest here asks that it be the *only* impairment standard. That is not what *USTA II* demanded.

As the Commission noted, Congress could have, but did not, incorporate into the Act specific language compelling or even suggesting that the essential facilities doctrine equaled impairment.[58] Additionally, "the structure of the Act itself suggests that we cannot equate impairment with the essential facilities doctrine, for "to equate 'essential' with 'impair' would collapse the Act's two unbundling standards, rather than respect the dichotomy that Congress

[53] Id. at 17.

[54] Id. at 42.

[55] *Iowa Utilities*, 525 U.S. at 389-390 & n. 11.

[56] *Triennial Review Order*, ¶¶ 107-108; see also *Iowa Utilities*, 525 U.S. at 388; *USTA I*, 290 F.3d at 427.

[57] *Triennial Review Order*, ¶¶ 107-108.

[58] Id.

established."[59] In this regard, the Commission's interpretation of the Act, not Qwest's, should be followed.

Qwest also argues that even if there is no competition in an area, if there is competition "in any given geographic area … with similar characteristics," that is "powerful evidence of a lack of impairment" in that area.[60] This argument must also fail. Qwest nowhere defines "similar characteristics" so that one can judge the validity of its generalization. On the other hand, the granular approach favored by *USTA I* and the FCC, which is to look specifically at market areas, will provide "powerful evidence" of impairment or lack thereof.

III. REVIEW OF STATE COMMISSION COMMENTS

The comments from the state commissions overwhelmingly show that continuation of the UNE-P is essential to maintaining local exchange competition in most states, at least for the near term. For example, the Utah Department of Public Utilities ("Utah DPS") has determined that UNE-P usage accounts for nearly half of CLECs' access lines overall and 91% of CLECs' residential share in Utah.[61] The Alabama Public Service Commission states that much of the residential and small business competition in Alabama is a result of the UNE-P, and that CLECs would have no place to turn without access to ILECs' facilities.[62] The Minnesota Public Utilities Commission noted that the success of competition in Minnesota (CLECs have approximately

[59] Id.

[60] Qwest Comments at 18.

[61] Utah DPS Comments at 4. A similar statistic is found in Ohio, but the Public Utilities Commission of Ohio ("PUCO") does not mention it in its comments.

[62] Alabama Public Service Commission Comments at 3.

19% of the end user switched access lines there) "was only possible as a direct result of the availability of loops, transport and switching as unbundled network elements at forward looking cost based rates," which occurred only because of "legal and regulatory obligations" which it enforced.[63]

The comments of the state commissions point to the need for the Commission to conduct "granular" and "nuanced" state-by-state impairment analyses. Such analyses should involve only those ILECs that challenged the national impairment finding in the *Triennial Review Order*, and only the territories that were the subject of the ILECs' original challenges. The Commission should not include in this proceeding ILEC service territories that were not analyzed by state commissions in response to the *Triennial Review Order*.

The Commission must also use a geographic market smaller than the MSAs, RBOC territory, or the entire country, as variously proposed by the RBOCs. Such a broad-brush approach has been rejected by numerous state commissions. For example the Missouri Public Service Commission and the Michigan Public Service Commission ("Michigan PSC") found that the use of an area larger than exchange boundary is not "granular."[64] The Utah DPS found that the wire center is the appropriate geographic market and that the MSA does not offer sufficient granularity.[65] The PUCO found that the appropriate geographic markets were contiguous wire centers within UNE loop rate zones in SBC Ohio's and Cincinnati Bell Telephone Company's

[63] Minnesota Public Utilities Commission Comments at 3.

[64] Comments of the Missouri Public Service Commission at 2-3; Comments of the Michigan PSC, Proposal for Decision at 7-9.

[65] Utah DPS Comments at 6-7.

territories.[66]

The only state commissions filing comments against retention of the UNE-P were the New York Department of Public Service ("NYDPS") and the PUCO. A response to the PUCO's comments can be found in the reply comments of the Office of the Ohio Consumers' Counsel.

The NYDPS, using its own impairment analysis, determined that more than half of the New York wire centers examined were not impaired.[67] Under even the NYDPS' test, then, there is impairment in the remaining wire centers. Further, the NYDPS recognizes that New York may be "unique."[68] It certainly appears so, given the preliminary findings included with the comments of, for example, the California Public Utilities Commission and the Michigan Public Service Commission.[69]

In addition, the Commission should reject the weighted impairment test that the NYDPS developed and recommends that the Commission use.[70] The NYDPS examined four alternatives to traditional wireline service -- the UNE-L, PacketCable phone service, wireless service and VoIP via DSL or cable modem -- and assigned weighting to the various alternatives "to reflect characteristics that may render them less than perfect substitutes for traditional wireline telephone service."[71] The NYDPS, however, considered not only actual deployment of the

[66] PUCO Comments at 8.

[67] NYDPS Comments at 7.

[68] Id. at 8.

[69] Michigan PSC Comments, Proposal for Decision at 24; Comments of the California Public Utilities Commission, Staff Report at 61-83.

[70] See NYDPS Comments at 6-12.

[71] Id. at 6.

"alternatives," but also "service providers' announced plans for expansion."[72]

Thus, the NYDPS test is a potential deployment test rather than an actual deployment test. Use of the analysis at best should be limited to those situations where an ILEC has raised a potential deployment issue. Use of the NYDPS test in actual deployment cases runs the risk of giving too much significance to intermodal competition and would delve into issues that might not have been raised in state commission proceedings.

The Commission should examine the information provided by the state commissions and use an actual deployment analysis where appropriate. The Commission should not include in its state-by-state examination issues that were not raised at the state level.

IV. CONCLUSION

For the reasons set forth herein and in NASUCA's initial comments, the Commission should salvage as much as possible of the *Triennial Review Order*, and should maintain as much as possible of the unbundling regime that has led to the beginnings of local service competition for residential and small business customers. This would be consistent with the statute and with the Supreme Court's view of the statute, which gives substantial deference to the Commission's decisions.

The Commission should adopt for its own use the principles that it delegated to the states in the *Triennial Review Order* as it makes the unbundling determinations required by *USTA II*. As discussed herein, however, the Commission should review impairment separately for residential and for small business customers, rather than combining them into a single mass

[72] Id.

market.

Respectfully submitted,

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